

October 3, 2002

Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.

CG Docket No. 02-278

Comments by:
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To the Commission:

A. General Issues

There is a clear need for additional rules and clarifications by the Commission. This need arises as a result of significant, in depth “experience in the field” of private enforcement experience. This experience was not available to the FCC when the FCC last revisited the rules and made changes. Years of private suits have revealed the places where the rules need to be made more exact and specific to allow consumers to enforce their rights under the TCPA without needing to endlessly rebut frivolous assertions made by violators’ attorneys. Many defendants attempt to infinitesimally parse words to induce the courts to grant “exemptions” where none exist nor were ever intended. Changes are necessary whether or not the FCC chooses to implement a national do not call database. The existing rules are violated, often with impunity, and so will subsequent rules, notwithstanding a national database.

The experience of 7 years of private TCPA litigation can be used by the FCC to better obtain the effects that the existing rules were designed to achieve. The actions of the Commission, while attempting to balance any outbound solicitors’ alleged “rights” should be well tempered with one single thought, to be considered at every juncture in the rule making process:

“Whose phone is it? The consumer’s or the outbound solicitor’s?”

The answer is obvious, and with that answer lies the obvious dominant right of the consumers to fully and effectively control their time and the use of their property. This position is fully supported in the law of this land since long before outbound tele-intrusions became today’s most common pest, even surpassing the common housefly. Supreme Court Justice Louis Brandeis wrote 100 years ago “the right to be left alone is the most comprehensive of rights and the one most valued by civilized man.”

If the Commission will remember that one single point in each decision it makes, and abide by it despite the obfuscating comments and pressures that will be brought to bear by those that wish to usurp consumers’ control of their time and their property, it will make the correct decisions.

B. Private enforcement.

In 1995 private enforcement of the TCPA began by a few people willing to use the TCPA to attempt to regain control of their personal property and time. In 1996, I was the sixth person in the USA to file a private TCPA action. The law is now over a decade old, and no longer news to the outbound telemarketing industry. Has the industry embraced the law, with *compliance*, since it no longer has any conceivable excuse for ignorance? Hardly. In 6 years of carefully documenting hundreds of telemarketing calls to my residence, not one call has fully complied with all the identification and other requirements of the law. During most of these calls I requested a copy of the caller’s do not call maintenance policy. To date, I have received only 35 policies, and some of those had to be forced to be produced during the discovery process before they were made available. Most of the policies are, at best, last minute attempts to “write something” and send it. Not one policy addresses all the issues that the

Commission has indicated should be contained in such a policy. For an example of a typical piece of paper purporting to be a legally adequate do-not-call maintenance policy see Attachment C.

Has my series of company specific DNC notices and private suits achieved compliance by the industry as seen in my residence? Again, hardly. One entity whom I sued in 1997 after DNC requests called two more times while the first action was still in the courts. I sued them a second time. They have called yet again this year. But this is not the most extreme example. It is a matter of public record that Mr. Sam Adamo of Ohio has sued AT&T more than 6 times, for continuing calls after repeated DNC requests and multiple successful actions in the courts of Ohio.

In my personal experience, many entities continued to call my household after repeated DNC requests. The most notable example is that of The Columbus Dispatch. I began making DNC requests to the Dispatch in 1973 (yes, *seventy three*). Usually these requests were made two or three times a year. These demands continued for decades, despite an Ohio law making repeat calls after a DNC demand a *crime*. It was not until I sued the Dispatch in 1998 that they ceased their endless dunning. However, rather than voluntarily comply with the law (they have a written DNC policy of recalling consumers, “after (1) year” to “see if they wish to remain on the DNC list”, See Attachment D), they fought my action against them in the courts of Ohio for four years.

In the never ending attempts of the outbound calling industry to abuse the privacy of consumers, the industry has not shifted itself towards compliance with the law, but expends efforts seeking to subvert it, and intimidate consumers. Every conceivable method is in play to hide the identity of callers, and not divulge identification as required by law. The Commission is fully aware of the techniques by the industry to accomplish these obfuscations. The techniques are in full bloom today and flourishing.

At one time Ms. Diana Mey of West Virginia was one of the first people to have a violating entity counter sue her in a TCPA action. However it has now become the norm for TCPA violators, often flagrant and habitual violators, to file frivolous counterclaims against those properly asserting their rights under the TCPA. For all the above reasons, additional action is needed by the Commission to eliminate existing loopholes, and to create new rules to proactively address this defiant, bloomin’ industry.

The Commission will undoubtedly receive many letters supporting telemarketing, praising its existence, and ignoring the distinction between inbound and outbound calling. Inbound telemarketing is a popular and laudable use of the telephone network. However, these letters will arrive as an orchestrated attempt by the industry to dissuade the Commission from taking the additional actions necessary regarding the manifest outbound telemarketing abuses perpetrated upon the public *as a matter of policy*.

Even those engaging in these practices know them to be a nuisance! The verbatim transcript below is from an unsolicited advertisement I received via an uninvited prerecorded telephone call. It illustrates some of the subversion techniques in use by the industry, and reveals the true opinion of these practices by the co-owner of the business that recorded the message and made the call. Please note that “Integrity Industries of Ohio” was not listed in the phone book, nor was it registered with the Ohio Secretary of State as a fictitious business name of the proprietors.

Resident: “Hello?”

Recorded male voice: “I have an important message for you. Please press 2 to continue.”

Recorded male voice: “Press 2 on your phone to continue.”

Touchtone sound 2 being pressed

Recorded female voice: “Hello. This is Barbara, with Integrity Industries of Ohio.

I have an urgent message for you.

I know you probably don’t enjoy phone calls of this nature.

Neither do I.

However, this is the least expensive method to contact you.

So don’t become upset, and I apologize for the interruption.

You may press your number 1 if you’d like to discontinue now.

We mailed you some information about our Spring home improvement sale.

Easy financing, low monthly payments.

You will receive 10 free thermal windows when you purchase our new seamless siding, gutters, and down spouts.

That's right!

You will receive 10 free thermal windows with your purchase of our new seamless siding, gutters, and down spouts.

Now, it's 10 square minimum.

Your home will be like a new home at the same address.

Low monthly payments, no money down with approved credit.

After the beep, give your name, phone number, and address.

And what's the best time to call.

Please speak slowly.

Again, I apologize for the interruption."

Beep sound

Resident: "Ok, now we'll verify where that call came from."

*Touchtone sounds of * 6 9 being pressed.*

Ameritech recording: "The last number that called your line was: 6 1 4 2 3 8 9 1 7 3.

This call was received on March 19 at 2:04PM."

Notice that the call begins with an evasion of its true purpose by *implying* there is a true emergency of some unspecified type (e.g. a notice by the county government regarding a flood danger), and not a notice of merely a sales call to follow. Also notice that the identity of the caller has been hidden by use of an unlisted, unregistered fictitious name, no address, and no phone number. Several former defendants in cases I have brought, and even more of their attorneys, have similarly expressed their disdain for the practices of the outbound telemarketing industry. Some of them have asked me for information on what they can do to stop the calls to their homes.

There is a settled doctrine of law, that laws intended to be used by simple men, should be written in simple language, and laws intended to be used by technical experts, be written in technical language. The Commission's rules are often the latter, intended to govern subject matter such as the complex and technical area of radio spectra and broadcasting. The TCPA is manifestly different. It is intended to be understood and used by everyone in his own home. The Commission's language should be chosen carefully to reflect that intent.

I have made specific comments and recommendations below to address some of the issues for which the Commission is seeking comments. These are based on my personal experiences in trying to enforce the TCPA in my home and on my telephone lines. To clarify the comments, and to ensure the correct interpretation by the Commission of my suggestions, I have prepared a draft of the TCPA rules as I believe they should be rewritten by the Commission.

I emphasize that these proposed revisions are those necessary to support the issues I am addressing, and are not an exhaustive list of all changes of merit. Other persons will be making comments on issues for which I have not had direct personal experience (e.g. fax related matters). My suggested changes are not meant to exclude appropriate changes of value proposed by others. See Attachment A. Additions are indicated by underlining, and deletions are indicated by a strike through font.

C. Specific Issues needing Commission action.

1. Incorporate all prior clarifications of the old regulations made by the Commission into the newly written rules.

The outcome of this NPRM will undoubtedly result in rule changes, additions, and/or deletions of some rules. Where prior clarifications have been made, those clarifications should be incorporated directly into the new rules. In any case where this is not feasible, then any such clarification should be immediately reissued at the same time the new rules are released. The reason for this is quite simple. If any such clarifications "fall into the cracks", violating entities will seize upon such an omission to

attempt to argue that the prior clarification is no longer a valid representation of the opinion of the Commission.

2. Do-Not-Call Policies designed to evade compliance.

As an example shows in Attachment D, some companies have a policy of thwarting the TCPA's private right of action by calling again, before expiration of the 10 year ban, just after one year. See "Also, The Columbus Dispatch may contact anyone on the do not call list after (1) year to determine if they wish to remain on the list or have the phone number deleted from the list." This calculated subversion of a consumer's DNC demand should not be tolerated by the Commission.

Other companies have a policy of violating the prerecorded calling rules. Attachment E shows the DNC Policy submitted to the Commission *after* it cited the calling entity in EB-02-TC-139. This policy was not sent to me upon my written demand, but only to the Commission after a citation. It still does not even remotely comport with the requirements of an adequate DNC Policy as previously delineated by the Commission.

The TCPA is no longer a newborn law needing time for the industry to design its operations so as to comply with it. The time is long past to allow any illegal calls. Indeed, the industry constantly opines it is compliant with *all* telemarketing laws. As such, the Commission should seek authority from Congress, as needed, to eliminate the "two calls in twelve month" language from the live call solicitation rules, and make every violating call actionable by a consumer. In addition, the Commission should make it absolutely clear that any violation of any rule is subject to the private right of action provided by the TCPA, not solely a violation of a do-not-call request.

3. Delineate in one place all the necessary requirements of a minimally acceptable DNC Policy.

The current rules and clarifications have mentioned various items that should be found in a do-not-call maintenance policy. However, many of these items are scattered among various publications of the Commission. *All* the minimal essential elements of a policy should be collected with the existing requirements listed in the rules. For the convenience of the Commission, I have collected the known elements, and listed them with an index to their location in prior Commission documents. These items should be augmented, of course, with additional requirements should the Commission enhance the rules to further protect the public as suggested herein, and by others. See Attachment B.

The list of essential elements to constitute a minimally adequate DNC Policy should be augmented by Commission rules additions. Those additions should mandate that any DNC Policy also contain the full name of the person responsible for compliance with the TCPA, that persons complete U.S. mailing address (not to be a P.O.Box), direct telephone line, and a date of implementation and complete revision history. See Attachment A at 64.1200(e) (3).

4. "Knowingly" and "Willfully."

These terms have been defined by law and/or the Commission for many years regarding the Telecommunications Act of 1934. See 47 U.S.C. 312 (f). In order to achieve uniform application of the FCC's definitions of these terms in private actions, the Commission should issue an official, specific clarification as to the proper definitions to be applied in TCPA cases.

5. Improper calls arriving on an answering machine are actionable violations.

The language of the act and/or regulations refers to the placement of prerecorded telephone calls "to a residential telephone line" of a subscriber. Many people have had to resort to letting their answering machines screen calls, and those recorded calls are often heard whether or not the receiver is taken off hook. Clearly the Commission and the public are aware of, and use, automated answering devices. The Commission should make it clear in its regulations, that leaving a live or recorded message

on such a device is no different than the placement of such a call when answered live by a consumer. See Attachment A at 64.1200(a) (2).

6. Exclude prerecorded calls to business lines.

It is my opinion that these calls are as great a nuisance when placed to a business line as to a residential line. I believe the Commission should revisit this issue, and reverse its earlier position by using the authority granted by Congress, and eliminating the business exemption for these types of calls. I know of many people who have expressed to me this frustration. The closest one is a neighbor three doors away, who has complained of having to answer the same recorded call on line after line in her job as a receptionist. Under the present rules she and her company have no recourse under the TCPA because the call to a business line is exempt, and only one line at a time is tied up by the caller.

7. Duplicate 64.1200(d) regulations on prerecorded calls to 64.1200(b).

The regulations created by the Commission requiring disclosures in prerecorded messages at (d) should be duplicated in (b) to insure uniform application in all TCPA actions. See Attachment A at 64.1200(b) (1)-(2).

8. Clarify and expand identification requirements.

Current outbound practices often are to supply merely a first name, which is also often an alias. Further, when phone numbers are provided, they are often those of answering machines that still do not provide identification, but merely demand the consumer's name and number be left for a call back. Addresses are often untraceable post office boxes. Even when toll free numbers are left to contact the caller, the sales representatives who answer such calls often flatly refuse to give out the name of the calling entity and its address. This outright evasion of identification needs to be addressed by the Commission.

For all of these reasons, more stringent identification should be spelled out in the rules. These rules should apply to each call initiated or received (when a consumer calls back) by any outbound telemarketing entity. Commission rules should specify not only that the disclosures of phone number and address must be given during any outbound call, but also must be provided upon request in any return call from a consumer.

"Hang up" (i.e. abandoned predictive dialer calls) calls thwart the consumer's right to issue a do-not-call demand. They also violate even the existing identification rules. No such call should be exempt from Commission identification requirements, and the rules should be specific enough to clearly encompass such calls.

Lastly what on earth could be more of an insidious, intentional, evasion of identification than the concept of ringing a phone line while using automated means to detect if an answering machine or live person has answered the phone, and then hanging up if the phone is answered live by a consumer? This is done because the outbound telemarketer wishes to only leave a message if an answering machine has picked up the call. It is intentionally wasting the time of the consumer, and invading the peaceful use of the consumer's home. It is an abomination to the sensibilities of all but those who practice it. It should be banned outright, and the consumer should have direct redress through commission rules demanding full identification in every outbound telemarketing call subject to its rules, without any qualification or exception of any kind. See Attachment A at 64.1200(b) (1)-(2), (d) (1)-(2), and (e) (6).

9. Calls "on behalf" of non-profits by for-profits should be actionable.

The legislative history shows that the Congress considered, but rejected, exemption for calls made on behalf of non-profits, but made by for-profit organizations (See earlier versions of the various bills that later were merged to become the TCPA). The Commission in its earlier rules issued such an exemption. This issue should be revisited by the Commission, and the exemption should be removed in

accord with the intent of Congress. Calls of this type are often sales pitches for commercial products or services in the guise of non-profit “front” or “shell.” See Attachment A at 64.1200 (c) (4).

10. Sending of DNC policies.

Policies are still rarely sent when requested. Often outbound agents still don’t know about them or refuse to send them. The Commission should tighten the rules to better insure compliance. See Attachment A at 64.1200(e) (3)-(4).

11. Modify the regulations specifically mandating that a calling entity must have in place procedures to accept more than one number for a DNC list in a single call.

I have had many personal experiences where callers refuse to accept more than one telephone number on DNC demand made at the time of a call to my household. Numerous excuses are made. The Commission should make it clear that a calling entity must immediately accept all telephone numbers from a called consumer when that consumer makes a DNC demand for all their residential telephone numbers. Businesses can commit to a commercial transaction instantly (e.g. e-bay bids; on phone or on-line credit card charges; switching of long distance carriers by phone, etc.) so do-not-call demands should be implemented immediately. The ability to do so is not the genuine issue, only the mandate to do so. See Attachment A at 64.1200(e) (5).

12. Mandate affiliates be included in a do-not-call demand if so requested.

Many organizations try to force consumers to notify each sales office for an obviously related product line (e.g. Nationwide Ins. Co. has taken the position in court that it is the consumer’s burden to notify each of its sales offices of a DNC demand). This is ludicrous. There are often thousands of agents selling insurance for a particular company, and often scores of them in a large metropolitan area. A single demand to an insurance carrier, for example, should apply to all its sales agents. See Attachment A at 64.1200(e) (7).

13. Correct the typographical error in the existing regulation 64.1200(e) (2) (vi).

The last revision of the rules contains a typographical error. The Commission should, at this time, correct it. “Consumer’s” or “called party’s” not “caller’s” request is the correct word to use in the regulation. See Attachment A at 64.1200 (e) (8).

14. DNC demands made by any person in a household, whether a billed party or not; or whether a listed party or not, should be binding upon the calling entity.

The commission has previously clarified this point. However, it should be explicitly incorporated into the rules as this issue is often raised by outbound violators in the courts. Many calling entities attempt to evade this requirement. See Attachment A at 64.1200(e) (8).

15. All of the live calling rules are separate, mandated rules.

Because of the existing numbering scheme of the rules, many violating entities have taken the position in courts that the Commission only promulgated two rules under 64.1200 (e). Renumbering and an explicit statement should make it clear the Commission has promulgated numerous, mandatory rules upon calling entities. Further, the scripts in use by calling entities, in addition to the solicitation as conveyed by an outbound agent, must all obey the rules. See Attachment A at 64.1200(e) (9).

16. Mandate accurate caller ID information.

Currently numerous outbound entities are widely known to be intentionally blocking caller ID and/or intentionally causing false caller ID information to be transmitted to residences. These ID blocking abuses should be prohibited by the rules, and due to their widespread impact a negating consumer's right to identify a caller. The Commission should take immediate FCC action against each and every entity that provides false caller ID information. See Attachment A at 64.1200(e) (10). In addition, the Commission should make it absolutely clear that supplying the correct CID information does NOT relieve the telemarketer from providing the information required by (e)(2)(iv). Having a phone rung and abandoned by a predictive dialer, even if accurate caller ID information were to be transmitted, does not allow the consumer the right to immediately issue a do-not-call request. The burden shifts a cost to the consumer to call or write the offending entity to issue a do-not-call demand.

17. Include all delivery technologies, present or future, in prerecorded message playing bans. "Random or sequential number generator" language should be removed from the regulations.

The evil of receiving a prerecorded message without consent is the intrusion itself, not the techniques used by the caller to deliver the message. A message played by a person with a simple cassette recorder, after dialing manually would be just as offensive to a consumer as one delivered by the most sophisticated automated dialing automaton. The definition of what constitutes an objectionable delivery should be modified to eliminate frivolous defense rouses too often used to hinder a consumer's TCPA action in the courts

The statute's ban on prerecorded messages contains no language that allows for such calls if the calls are not made using a "sequential dialing" device. Many calling entities raise the spurious defense that their devices can't or don't generate and dial numbers "sequentially" or "randomly." They intentionally misinterpret this language to mean "in increasing numerical order," or worse, claim that because their machine doesn't fit the statutory definition, the call is exempt from the law. The wording of the rules should delete language to come into complete alignment with the law, and thereby eliminate this frivolous "defense" by callers violating the TCPA. It might be necessary for the Commission to seek authority to do this from Congress. The Commission should begin such approval processes at the earliest possible date. See Attachment A at 64.1200 (a) (2), (f) (1), and (f) (6).

18. No sale need be proposed to find a call to be a solicitation or advertisement.

The definitions of "unsolicited advertisement" and "telephone solicitation" are grammatically correct by their plain language. However, other laws are often written to apply to situations only if a proposal of a sale is part of the contact. As such, many courts have "read into" the TCPA such an interpretation. The Commission should modify its rules to make it explicitly clear, that no sale need be proposed to fall within the scope of these terms. See Attachment A at 64.1200(f) (3).

19. Free estimates, phony product "surveys", and free offerings are solicitations and advertisements.

Similar to the above comment, "free" goods are offered and because the offer purports to be free, evasions of the Commission's rules are frequently attempted in the courts. The Commission should modify its rules to make it explicitly clear, that "free" proposals also fall within the scope of the definitions of "unsolicited advertisement" and "unsolicited solicitation." Likewise phony product "surveys" are used to promote products, and their inclusion in the definitions should be made clear by the Commission. Lastly, radio station promotions encouraging listening are clearly advertisements. See Attachment A at 64.1200(f) (3).

20. Established Business Relationships.

"There simply is no right to force speech into the home of an unwilling listener."
Frisby v. Schultz, 487 U.S. 474, 485 (1988).

Just whose phone is it, anyway? The salesman's or the consumer's? One should not have to abandon business relationships or disconnect one's phone to be able to control incoming calls. As stated by Amicus Mr. Robert Biggerstaff at oral arguments to the Ohio Supreme Court on 10/3/01, "I don't think I should have to live the life of Ted Kaczynski to get away from telemarketers, and the FCC didn't think so either." As the Commission is well aware, this opinion was shared by Congress, when it *directed* the Commission to address this issue in its rulemaking processes, and prohibit calls to any existing customer after that customer's do-not-call demand. Neither should one have to cancel a Sunday newspaper subscription to remove the wolves who have intruded behind telephonic doors closed to them by a homeowner's do-not-call demand. Callers can not be allowed to choose to interrupt a consumer's home life, and force consumers to listen to their unceasing howling for the sale of their everyday pulp.

If, however, the Commission were to ignore the clearly expressed will of Congress on this point, then they will have thrown wide open a door to which the sales pitches of each and every product will have to be tolerated by all consumers. A decision to exempt calls of existing customers after a do-not-call demand would scuttle the entire TCPA, as databases of consumers, and their business contacts, exist. Should a particular vendor (without an EBR exemption) have its telephonic door closed by a consumer's do-not-call demand, that vendor would need only find a business which is in a business relationship with that consumer. It would then 'partner' with the EBR exempt business to become a shill to sell the products of the closed out vendor.

This was obvious to Ohio's Chief Justice during oral arguments regarding precisely this point of law. The issue had been fully briefed to the Court, including the aspects of co-branding and co-marketing by such secondary, allegedly "EBR exempt," vendors of a product or service. This exchange took place between the Court and the Dispatch's attorney Mr. Marion Little, Esq. as the Court addressed precisely the point at issue:

C.J. Moyer: "Ok, I want to get to that issue, because my concern is. What you're telling us, I think. What I think affirming this would do. See if I'm right: I have an established business relationship with the Dispatch. I get their paper. I pay them. That means I can *never* stop those calls at dinnertime three nights a week. Is that right?" (emphasis by C. J. Moyer)

Mr. Little: "You can only stop them when you decide to terminate the business relationship, yes, your honor."

The Chief Justice understood the significance of this critical point of the TCPA, and joined five other justices in the Court's opinion holding the interpretation of the law as intended by Congress.

It is also worth noting that the Court understood the significance of this issue regarding its everyday impact on the lives of millions of consumers. This was the only case in Ohio's history where a pro se appellant, without the formal assistance by licensed legal counsel, was able to obtain a reversal of an appellate court decision in a *discretionary* appeal accepted by The Ohio Supreme Court. See Attachment A at 64.1200(f) (4).

On a related matter the Commission asked, "Should we consider modifying the definition of "established business relationship" so that a company that has a relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product?" The answer to this is clear! The Commission members need only recall what happened to the prices of sirloin steaks in times of price controls. Many new "products" spontaneously appear in the market at higher prices: all of them sirloin steaks in with new names (e.g. "back yard steaks") designed to evade price controls.

The TCPA's effectiveness would be eviscerated in a week were the Commission to allow product-specific exceptions to do-not-call demands. A "credit card" offer declined by a consumer with a DNC demand, will be followed by a "shopping convenience card" offer from the same entity. A "mortgage refinance loan" pitch similarly declined will be followed up by a "housing cost reduction plan" offer. Bank on it. The Commission should never allow outbound telemarketers to solicit for any products once that solicitor has been told to cease soliciting a consumer.

21. Additional formal definitions.

Many attempts by consumers to enforce the TCPA privately have been severely hindered by misconstructions of the Commissions prior rules. Making explicit definitions of additional terms would greatly improve compliance by making additional terms clear to the outbound industry and the courts.

The existing wording regarding prerecorded messages uses the phrase “to initiate a call.” Too often, this phrase has been ignored by the courts. It was, is, and should be, the law that any consent to receive a prerecorded message must be given prior to the initiation of the call. As such the wording of this regulation, unfortunately, is inadequate in its present form. Consent can not, and should not, be deemed to have been given when a consumer attempts to identify the caller by allowing the call to proceed to a point where the identification *might* later be given, even if this entails pressing a button on the phone to “request” more information. The Commission should reword the regulations to make this point unarguably clear to even the most biased court fact finder.

Listing of phone numbers in a public or private directory does not constitute “express consent.” Again, the Commission has made such clarifications, but not for all circumstances. This should be incorporated into the new rules. One’s phone number listed in a directory is not consent to break into one’s home, nor to make obscene or threatening calls to that residence. Neither is it consent to engage in any other unlawful activity, including placement of illegal telemarketing calls into that home. See Attachment A at 64.1200(f) (6)-(7).

22. Additional notices on autodialing equipment and software.

Many businesses are routinely being defrauded by vendors of hardware or software used to place prerecorded messages (e.g. See Letter to Kirk A. Schroeder of August 21, 2002 from Mr. David Michael in response to the Commission’s citation EB-02-TC-139). The Commission should promulgate regulations requiring a warning in a bold font on the outermost packaging of any such product, and also on a label permanently affixed to such a device, or in the case of computer software, affixed to the disk or media. Words to the effect that “Federal law severely restricts the use of this equipment to place automated telephone calls. Improper use can result in suits by consumers called, and by action by the FCC. FCC action may include a forfeiture of up to \$11,000.00 for each improper call placed to any consumer” should be required.

The Commission should also implement rules specifying that the sale or lease of equipment in violation of the above disclosure is a violation of the Commission rules. They should then use their powers of enforcement to assess a forfeiture of \$11,000.00 for every instance of a sale in violation of these rules that is brought to the Commission’s attention. This would be the most proactive and effective action the Commission could take to achieve the results intended by Congress when it enacted the ban on prerecorded advertising.

Respectfully submitted for your consideration,

Philip J. Charvat

(a) No person may:

(1) Initiate any telephone call (other than a call made for emergency purposes) using an automatic telephone dialing system or an artificial or prerecorded voice:

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any ~~residential~~ telephone line (whether answered live by a person or by the person's telephone answering machine or voice mail) using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by Sec. 64.1200(c) of this section.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of Sec. 64.1200(a) of this section, the term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

All artificial or prerecorded telephone messages delivered by an automatic telephone dialing system shall:

(1) At the beginning of the message, state clearly the identity of the business, individual (first and last name of the true living individual), or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) and address of such business, other entity, or individual. The phone number given may not be to that answered by a recording, but must be to a telephone line answered in the normal course of business by a live person between the hours of 8AM and 5PM local time. The address given may not be to a post office box, but must be the true physical location including street number and name, city, state and zip code of the entity's business.

(c) The term telephone call in Sec. 64.1200(a)(2) of this section shall not include a call or message by, or on behalf of, a caller:

(1) That is not made for a commercial purpose,

(2) That is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) To any person with whom the caller has an established business relationship at the time the call is made, or

~~(4) Which is a tax-exempt nonprofit organization.~~

(d) All artificial or prerecorded telephone messages ~~delivered by an automatic telephone dialing system~~, shall:

(1) At the beginning of the message, state clearly the identity of the business, the individual by first and last name, or other entity initiating the call. The name given may not be an alias but must be the true name of a living individual, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) and address of such business, other entity, or individual. The phone number given may not be to that answered by a recording, but must be to a telephone line answered in the normal course of business by a live person between the hours of 8AM and 5PM local time. The address given may not be to a post office box, but must be the true physical location including street number and name, city, state and zip code of the entity's business.

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber unless such person or entity has established a written do-not-call policy which meets or exceeds all the minimum standards in (1)-(10) of this part:

(1) Calls shall not be placed before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location); and

(2) Persons or entities using telephone solicitations must institute procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity; and

(3) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon the written or oral demand by a telephone subscriber, for maintaining a do-not-call list. When requested, a policy must be by mailed within 5 business days of the request. The calling entity may not require the consumer to take any other action to obtain a copy of the policy. In addition to all other requirements of a do-not-call maintenance policy, the policy must contain the full name of the person who is responsible for the entity's TCPA compliance, that person's complete U.S. mail address (not to be a P.O. Box), that person's direct telephone number, and a date of implementation along with a complete revision history of the policy; and

(4) Training of personnel engaged in telephone solicitation;
Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list, the do-not-call policy, and the requirements for furnishing the policy when requested; and

(5) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must immediately record the request and place the subscriber's name and telephone number on the do-not-call list. If additional numbers are furnished by the subscriber, they must be entered on the do-not-call list. Such a request is effective immediately, and must be honored immediately thereafter.

If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity, except as provided in (7) below; and

(6) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the first and last name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number and address at which the person or entity may be contacted. All required disclosures must be made in every telephone call to a consumer. All of them must be made whether or not the consumer has asked for the information. It is the caller's burden to ensure that the disclosures are made. The name given may not be an alias, but must be the true name of a living individual. The address given may not be to a post office box, but must be the true street number, street name, city, state, and zip code of the company's business location. If a person or entity makes a solicitation using an artificial or prerecorded voice message ~~transmitted by an autodialer~~, the person or entity must provide a telephone number ~~other than that of a autodialer or prerecorded message player which placed the call.~~ The telephone number provided which may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The phone number given may not be to one that is answered by a recording, but must be to a telephone line answered in the normal course of business by a live person during normal business hours. During any call by a consumer in response to any call from a telemarketing entity, the telemarketing representative answering any such call shall make all the name, phone number, and address disclosures to the consumer if so requested by the consumer; and

(7) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised. However, if the consumer requests broader, "blanket" application of the do-not-call demand by asking for it to apply to all "affiliated entities, it shall apply to all principals, subsidiaries, affiliates, business partners, and any agents of any of them; and

(8) Maintenance of do-not-call lists. A person or entity making telephone solicitations must maintain a record of a consumer's request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made by not making subsequent calls to that household. It must be honored when given by any member of a household who answers the phone call, or makes a written do-not-call demand prior to a call (whether directly or through any authorized third party agent of the consumer), whether they are listed or not in any phone directory, and also whether or not they are the person to whom the telephone line is billed; and

(9) All telemarketing scripts must conform to all of these rules. All scripts shall contain the all the full and complete disclosures required by these rules; and

(10) All steps technically feasible to deliver accurate caller ID information must be taken by any calling person or entity. No inaccurate caller ID information may be transmitted in any call, nor may caller ID information be blocked in any manner.

(f) As used in this section:

(1) The terms **automatic telephone dialing system** and ~~autodialer~~ means equipment which has the capacity to initiate telephone calls to telephone lines with or without the manual assistance of a live operator, and which may or may not be capable of delivering a prerecorded or artificial voice message.

(2) The term **telephone facsimile machine** means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term **telephone solicitation** means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person. The term does not mean, nor may be construed to mean, that any actual sale, rental, or investment be proposed in the call. It is specifically intended to include offers of “free” merchandise, “surveys” which assist in sales of products, goods, or services of any kind whether explicitly or implicitly.

The term does not include a call or message:

- (i) To any person with that person's prior express invitation or permission;
- (ii) To any person with whom the caller has an established business relationship; or
- (iii) By ~~or on behalf of a~~ a tax-exempt nonprofit organization.

(4) The term **established business relationship** means [a consumer revocable exemption](#) based on a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by [a Do Not Call request](#). [Any Do Not Call request from a called party's household ends the established business relationship exemption from our rules for the calling entity. This termination applies any of its affiliates, subsidiaries, principles, business partners and any other entities acting in concert or cooperation with the calling entity if so requested by the called party. The do-not-call demand also voids the established business relationship exemption for any form of telemarketing regardless of whether the consumer's household continues to engage in business transactions or further makes inquiry of the calling entity or its affiliated entities.](#)

Any established business relationship exemption originally created by a mere inquiry, shall expire in three months, and be deemed void.

(5) The term **unsolicited advertisement** means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

[\(6\) The term **advertise** shall be broadly construed and mean:](#)

[1: to make something known to : Notify](#)

[2 a : to make publicly and generally known](#)

[b : to announce publicly esp. by a printed notice or broadcast](#)

[c : to call public attention to esp. by emphasizing desirable qualities so as to arouse a desire to buy or patronize.](#)

[Playing a message to a consumer's household via the telephone, or calling a consumer's household by a live operator shall constitute “advertising” for the purposes of our rules.](#)

[\(7\) The term **prior express invitation or permission** shall mean an affirmative act by the consumer directed to a specific calling entity prior to any call in question. The act may be verbal or written, but may not be deemed to have been granted by mere listing of a telephone number in a public or private directory. It does not include any action taken by a consumer after a call has already been initiated by a calling person or entity.](#)

Requirements defined per various regulations of what constitutes, or fails to constitute, an adequate

Do Not Call Maintenance Policy

Checklist of Federal Requirements mandated upon Telemarketers for their DNC Maintenance Policies

Req Met?	Requirements that must be included in a DNC Maintenance Policy	Source Numbers
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List within the policy that Telemarketing agents are required to be trained to:

- | | | |
|-----|---|--------|
| ___ | 1. Record all DNC requests by subscribers immediately. 6, 15
(any such words 'count': e.g. "I don't want anymore calls") | |
| ___ | 2. Know of and abide by calling time limitations. | 11, 14 |
| ___ | 3. Mail DNC Policy upon demand to the subscriber. | 2, 3-5 |
| ___ | 4. Recognize and process DNC requests. | 15, 21 |
| ___ | 5. Honor do-not-call requests for 10 years. | 22-24 |
| ___ | 6. Refrain from all calls to subscribers, even to see if the consumer "still wants to be on the DNC list". | 24-25 |

List within the policy all steps to be taken to ensure compliance:

- | | | |
|-----|---|---------------|
| ___ | 7. Formulate and document policies and procedures. | 3, 4, 7-10,13 |
| ___ | 8. Prepare written DNC maintenance policy for distribution. | 2-5 |
| ___ | 9. Disclose who will maintain the DNC list. | 16 |
| ___ | 10. Affirm that consumers may <u>sever</u> 'business relationships' and not <u>receive further solicitations</u> from that organization. | 26-27 |
| ___ | 11. An EBR can NOT be based solely on a prior solicitation | 30 |
| ___ | 12. EBR expires in "a couple months" without ongoing relations | 31 |
| ___ | 13. Capturing an ANI does not constitute Express Consent | 28 |
| ___ | 14. State that DNC request will not be forwarded to non-affiliates unless so requested by the consumer | 29 |

List within the policy restrictions and requirements regarding solicitation script.
Telemarketers **must** disclose, without any inquiry from the subscriber:

- | | | |
|-----|--|-------|
| ___ | 15. The telemarketer's Full name. | 17-19 |
| ___ | 16. The name of calling organization. | 17-20 |
| ___ | 17. The name of organization on whose behalf the call is made. | 17 |
| ___ | 18. The phone or address of the calling organization. | 17-20 |
| ___ | 19. The phone or address of the client organization of the caller. | 17 |

Source Number	Topic	Document Referenced	Requirement stated in Document
1	Establishment	CFR 64.1200 (e) (2) (i)	Must have written policy available on demand for maintaining the DNC list.
2	Distribution	MO&O P. 38	Consumers must not be required to pay for procedures to protect them.
3		Report 1, Summary	Formulate and <u>distribute</u> a written policy.
4		Report 1, Background	Formulate and <u>distribute</u> a written policy.
5		Report 1, Page 5	...did not <u>provide</u> a copy as <u>required</u> by law.
6	Adequacy	CFR 64.1200 (e) (2)	Must meet <u>minimum</u> requirements (i) - (vi).
7		Report 1, Page 6	"a four line statement of compliance fails".
8		Report 1, Page 10	An example of an inadequate policy.
9		Report 1, Page 17	Question 2, what steps are taken....
10		Report 1, Page 18	An example of an inadequate policy.
11		Report 1, Page 19	No reference to calling time limits.
12		Report 1, Page 19	Tele reps ought to acknowledge.....
13		Report 1, Page 22	Example of GROSSLY inadequate policy.
14	Time Limits	CFR 64.1200 (e) (1)	Must call between 8am and 9pm local time.
15	Recording	CFR 64.1200 (e) (2) (iii)	Must be <u>immediate log at time of request</u> .
16			Who will maintain the list.
17	ID of Caller	CFR 64.1200 (e) (2) (iv)	Must provide name, phone or address.
18		MO&O P. 7	and name of client, phone or address.
19		MO&O P. 7	Full Id of caller.
20		MO&O P. 7	WITHOUT asking for it, it's the burden of the telem to provide it.
21	Maintenance	CFR 64.1200 (e) (2) (vi)	Must record DNC request of THE consumer
22			Must honor the request <u>for 10 years</u> .
23		MO&O P. 15	Honor it for 10 years.
24		R&O P24, MO&O P. 15	Purpose is to ENSURE request IS respected.
25		R&O P24, MO&O P. 15	A call to ask to be solicited IS a solicitation in violation of the DNC request.
26	Withdrawal of Consent	MO&O P. 11	Resident withdraws...further solicitations... are subject to the rules.
27		R&O P. 35, MO&O P. 11	...sever...are REVOKING consent to ANY future solicitations.
28	Express Consent	R&O P. 31	NOT given when subscriber's number is captured by caller ID or ANI device.
29	NON-Disclosure to non-affiliates	CFR 64.1200 (e) (2) (iii)	DNC request NOT to be shared with non-affiliates unless requested by consumer.
30		8 FCC Rcd 482	Industry Bulletin, At P. 2, Q2.
31	EBR	HR Report 102-455 Section 3.	A person who recently...who requested a loan a couple months ago..."

Note: Report 1 is the "Report Card on Compliance with the Telephone Consumer Protection Act of 1991 by Top Companies in the Telemarketing Industry. A Majority Staff Report prepared for the use of the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce. U.S. House of Representatives, July 1994" FCC docket CC 92-90.

FCC's FAX and Prerecord TCPA Regulatory requirements

Checklist of Federal Requirements mandated upon Telemarketers for their FAX and Prerecorded calls

Req. Met?	Requirements that must be met	Source Numbers
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FAX

___	1.	Must have prior express invitation or permission to FAX	1
___	2.	FAX is subject to regulation if contains an advertisement	2
___	3.	“Advertisement” defined	3
___	4.	<u>FAX content requirements.</u> Name <i>and</i> phone number of sending entity	4
___	5.	<u>Exemptions</u> Does not include an advertisement Established Business Relationship is <u>NOT an Exemption</u>	5 6

PreRecorded or automated voice “advertising” calls

___	1.	Must have prior express consent to initiate such a call	7
___	2.	Call is subject to regulation if commercial and contains an advertisement	8
___	3.	“Advertisement” defined	9
___	4.	<u>Message content requirements.</u> Name of entity Phone number or address of entity	10 11
___	5.	If call is also a “solicitation” it must meet live call rules	12
___	6.	<u>Exemptions</u> Established Business Relationship Non-Profit organizations	13 14

Source Number	Topic	Document Referenced	Requirement stated in Document
1		47 USC 227 (b) (1) (C) 47 USC 227 (a) (4)	See Statute See Statute
2		47 USC 227 (a) (4)	See Statute
3		47 USC 227 (a) (4)	See Statute
4		47 CFR 68.318 (c) (3)	See Regulations ...in a margin...of each page... the date and time...and identification of the business...and the telephone number of the sending machine
5		47 USC 227 (b) (1) (C) 47 USC 227 (a) (4)	See Statute See Statute
6		47 USC 227 (b) (1) (C) 47 USC 227 (a) (4) Note CFR Regs make the exemption, but not caselaw.	See Statute See Statute: NO EBR exemption

PreRecorded or automated voice “advertising” calls

7		47 USC 227 (b) (1) (B)	See Statute
8		47 CFR 64.1200 (a) (2) 47 CFR 64.1200 (c) (1) – (2)	See Regulations See Regulations
9		47 USC 227 (a) (4) 47 CFR 64.1200 (e) (5)	See Statute See Regulations
10		47 CFR 64.1200 (d) (1)	See Regulations
11		47 CFR 64.1200 (d) (2)	See Regulations
12		MO&O Par. 19, FN 58, at 12,401	If an artificial or prerecorded message contains a telephone solicitation....
13		47 CFR 64.1200 (c) (3)	See Regulations
14		47 CFR 64.1200 (c) (4)	See Regulations

POLICY FOR MAINTAINING A DO-NOT-CALL-LIST

Upon receipt of a request from a residential telephone subscriber not to receive calls from AJ Marketing Group, AJ Marketing Group will place the subscribers name and telephone number on the Do-Not-Call-List at the time the request is made.

The Columbus Dispatch

5300 Crosswind Drive • P.O. Box 1289 • Columbus, Ohio 43216-1289 • (614) 461-5000

Dispatch Consumer Services

DO NOT CALL POLICY

*Jandra,
this is all
Policy as you
requested. I
have removed
you #'s.*

In accordance with FCC and FTC regulations, residents and business' in our circulation area, upon request, may have their phone numbers deleted from the regular solicitation call rotation.

Regardless of how the request is received, the information is to be forwarded to the Circulation Marketing Department immediately so the phone number may be added to the master do not call list. The Circulation Marketing Department will forward the request to any contractor making solicitation calls on its behalf.

Phone numbers for hospitals, emergency services, physicians, health care facilities, fire protection, law enforcement agencies, paging services, mobile radio, cellular telephone, and other services which are charged for the call are also removed from the calling sequence.

All information on the do not call list will ^{be} utilized to delete numbers during the preparation of normal future calling lists.

By law, current subscribers to The Columbus Dispatch may be contacted. Although not required by law, requests by current subscribers to be placed on the do not call list will be honored as a measure to respect the privacy of the subscriber. Also, The Columbus Dispatch may contact anyone on the do not call list after (1) year to determine if they wish to remain on the list or have the phone number deleted from the do not call list.

The request of a written copy of the do not call policy will be mailed within 72 hours of the request, provided the full name, complete mailing address, and phone number of the person are given at the time of the request.

DO NOT CALL POLICY

THE MICHAEL MILLER BRIGGS INSURANCE AGENCY, INC.

33 EAST NORTH STREET
WORTHINGTON, OHIO 43085

- 1) The owner or the office manager of the agency are they only two people authorized to operate the auto-dialing machine.
- 2) If anyone asks to be included on the do not call list their telephone number will be added by one of the two aforementioned individuals.
- 3) If in the conversation, the owner or office manager discovers that the caller has more than the one residential telephone number, then they will ask for those additional numbers and add them to the do not call list.
- 4) The list shall be maintained on the auto-dialing machine.
- 5) The list shall be maintained for as long as required by law.